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In The

Supreme Court of the United States

October Term, 1976

No. 76-1136

ROBERT J. HELSTOSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF SUPPLEMENTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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On page 17 of the Petition, counsel urged as a reason for granting the writ the fact that:

> "The United States Court of Appeals for the Fifth Circuit is now considering the identical issue [government's calling a witness for the sole purpose of extracting from him a claim of self-incrimination] in *United States v. Ritz*, Docket No. 76-1715. In light of the Fifth Circuit's 1965 decision in *San Fratello v. United States*, *supra*, there exists a very good likelihood that that court will reverse the conviction on the sole ground that calling a witness for the purpose of extracting from him a claim

of self-incrimination is prejudicial error, requiring a reversal and a new trial" (Petition at 17).

As anticipated, on February 28, 1977 the United States Court of Appeals for the Fifth Circuit reversed the conviction of four defendants for knowingly passing counterfeit bills and conspiring with another person to pass said bills. The court held that permitting the husband of one defendant, who was also the father of two other defendants, to take the witness stand, after being called by the prosecutor, and testify up to the point where an anticipated answer to a question, in respect to which the witness claimed his fifth amendment privilege, would likely be assumed by the jury to be inculpatory constituted reversible error. In light of the Third Circuit's finding no reversible error in an almost identical situation in the instant case, a conflict exists between the Third and Fifth Circuits, which conflict must be resolved by the Supreme Court's granting the petition for certiorari to decide the issue.

In *Ritz, supra*, the witness, who had a very close relationship with the defendants, was called by the government and eventually advised of his right to counsel. The witness' appointed counsel, after conferring with his client, told the prosecutor that he had advised the witness to take the fifth amendment. Therefore, as in our case, the government was well aware of the witness' intention to claim his privilege. After answering some preliminary questions posited by the prosecutor, the witness asserted his rights under the fifth amendment when asked whether he had occasion to give his wife and children (the defendants) "anything" on a certain date. Similarly, prosecution witness Frank Racioppi — whom the government

knew would invoke his privilege and for whom immunity was sought and obtained — pleaded the fifth amendment when asked on direct examination if he cashed checks drawn on three corporations and shared the proceeds with petitioner.

The words of the Fifth Circuit are most applicable to the situation with respect to prosecution witness Frank Racioppi, a business partner of petitioner who was named as an unindicted co-conspirator:

> "We have no doubt that this whole contretemps was in fact prejudicial to the defendants. It would be difficult to see how the average juror could fail to assume that the Government would not put on the witness stand to testify against his wife and children any witness who did not have some pretty strong evidence to help the Government's case. Assuming, as the jury should, that counsel, in seeking the father's testimony was acting in good faith with the idea that what he would say would be relevant and material in proving the guilty knowledge of the defendants, how could the jury feel otherwise than that if Robert Ritz, Sr. had answered his testimony might not only have placed him in jeopardy but would also have helped convict the four defendants. This is not the case of the 'ordinary witness,' as described in *San Fratello v. United States*, 340 F.2d 560 (5th Cir. 1965) as:
>
> 'That is, . . . one not so closely connected with the defendant by the facts of the case, the pleadings, or relationship that the inference of the witness' guilt would likely be imputed to the defendant. . . . 340 F.2d at 565, footnote 6' " (Slip Op. at 1819).

Nor can Racioppi be designated as the "ordinary witness". Rather, as in *Ritz*, he was so closely associated with petitioner

that his inferential guilt by claim of privilege was necessarily imputed to petitioner.*

It is readily apparent that *Ritz* governs the situation in the instant case and mandates a finding of reversible error, which conclusion was not reached by the Third Circuit. On the basis of the conflict between the Third and Fifth Circuits, it is respectfully requested that this Court grant the writ of petition for certiorari.

April, 1977

Respectfully submitted,

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*In *People v. Giacalone*, 20 Crim. L. Rptr 2510 (Mich., Feb. 15, 1977), the Michigan Supreme Court held that reversible error was committed when the prosecutor called a witness with the knowledge that the witness would claim his privilege against self-incrimination. When the witness declined to answer whether he recalled the date of the offense, claiming his fifth amendment privilege, the jury may have inferred that the answer given would have been favorable to the prosecution. The jurors had already learned through other testimony that the defendant and the witness had committed the offense, thus connecting the two individuals. An adverse inference from the witness' refusal to answer may have carried over to the defendant. Counsel objected to the procedure. The court did not instruct the jury with respect to the witness' claim of privilege.